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Peter Brooks

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# Literature as Law's Other

**Peter Brooks\***

## *1. Law and Literature: So Far*

The context provided by an AALS panel on Law and Humanities, organized by Jessica Silbey under the title “Reasoning from Literature,” led me to reflect on my own notions of how literature, or more specifically the interpretive humanities, may stand in relation to law. To begin, I thought it might be useful to dwell briefly on the “law and literature” enterprise, which, especially in the United States, became something of a movement: not quite what you would call a “school,” but nonetheless a set of perspectives, an agenda for research, an aspiration to cross-disciplinary understanding. The movement arose, it seems, in reaction to a growing predominance of “law and economics” as the commanding paradigm in American legal education. It responded to a rumor, increasingly audible from the late 1970s, that there was something of interest going on in the interpretive humanities that might be germane to legal studies. The transfer of a number of graduate students from the humanities (where job prospects looked bleak) to the law schools no doubt acted as a vector for the transmission of ideas. Law and literature increasingly in the 1980s and 1990s spawned conferences, essays, anthologies, and then histories of the enterprise, and societies to promote it. Others have already written the obituary of a movement that seems to have lost its original radical force, to become one more academic field. In my own view, the movement has more often than not strayed from its most productive paths of inquiry. Yet it remains of crucial importance, perhaps now more than ever. I would contend that the eight years of the Bush administration saw perhaps the greatest divorce between law and humanism in our nation's history. Scholars in law and humanities might have something to say about that.

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\* Peter Brooks is Sterling Professor of Comparative Literature Emeritus, Yale University, and Andrew W. Mellon Foundation Scholar, Princeton University.

It's not that I think "the humanities" necessarily teach people to behave humanely—to think so is to misunderstand the meaning and the history of the term humanism. But the humanities can perhaps teach people to *read* with a fine and necessary suspicion.

The "law and literature" rubric has always covered a range of understandings of that "and." It can mean "law *in* literature," as when one studies representations of the law in literary works (for instance, Aeschylus's *The Oresteia*, Dickens's *Bleak House*, Melville's *Billy Budd*, or Kafka's *The Trial*): not a negligible enterprise, since literature is often profoundly about discovery of the law, or perhaps the Law. Tragedy, especially, may always be about an encounter with the Law, discovered in the moment of its infraction. Or, the rubric may mean "literature in the law": summoning legal scholars and practitioners, including judges, to read literature in order to become more sensitive to the human consequences of legal actions. More subtly, this *and* can call for confrontation and debate between two fields that overlap in ways that precisely call for dialogue. All these understandings respond to a desire to bring legal and humanistic thought together—back together again, perhaps, since it is arguable that law originally, in ancient Athens, entertained close relations with rhetoric, and still did so early in the American republic, with the later coming of the professional law school severing this tie.

The most dramatic claim of "law and literature" has resulted from the deliberate invasion of one by the other: from the argument that interpretive methods and theories elaborated in literary studies can and should be imported into the study of law. Literary theory in the late twentieth century became an export commodity, forced on the attention of scholars in other fields. American law is highly textual. It eventuates, as one rises in the hierarchy of courts, in extensive written opinions that often turn on issues of interpreting other written documents, including the Constitution. Theories and practices derived from fields that had long thought about what it means to read and to interpret seemed pertinent. A number of legal scholars turned, with enthusiasm or bemusement, to issues raised by hermeneutics and various forms of post-structuralism, to ask for instance: are the grounds of legal interpretation as stable as they traditionally have been claimed to be? Are there any grounds of interpretation that do not themselves derive from the practice of interpretation, that is, from the rhetoric of the law itself? Legal scholarship here has been abetted—or perhaps goaded—by the work of literary scholars and theorists who have seen in law a nexus of textuality and worldly power, hence a field in which their tools might be of some real use in the world.

Judges, lawyers, and legal scholars have tended to treat the language of the law as if it were fully hermetic, to be judged only in reference to the texts and traditions of the law. They have often assumed that

interpretation within the law could proceed on unchallenged assumptions about “intention” and “meaning,” how they line up with one another, how they are to be determined. One result of the infiltration of literary-critical thinking into the legal domain has been a questioning of law's internal definitions of some of its terms of art, of the languages it deploys in talking about human agency, of its unproblematic understandings of narrative and rhetoric. Yet the most widely read book on law and literature, Judge Richard A. Posner's *Law and Literature: A Misunderstood Relation*, takes the position that the two domains should be insulated from one another: that literary criticism should be free to construe texts in a “New Critical” manner, according to textual implications alone, free from constraints of intention or context; whereas legal interpretation must always be intentionalist and contextualist, attentive to the explicit or implicit original intent of the Constitution, of statutes, and of prior decisionmaking.<sup>1</sup>

The question may then be: should Posner's *cordon sanitaire* be roped round the law to maintain the isolation of the field's language? And even more: *can* it be maintained, even if you wish it to be? An era of suspicion has been inaugurated, and it may prove impossible to keep legal language free from the contamination of literary-critical thinking. At stake here may be the autonomy of the law, as practice and as intellectual discipline: can it truly stand alone? And a derivative question: should legal studies be so intent on isolating themselves from other interpretive disciplines within the university? I mean here to implicate both intellectual questions and institutional ones concerning how we teach the law.

## 2. *What's At Stake?*

American law students typically are told in their first class that they are in school to learn “to think like lawyers”—and this lesson will have been repeated frequently by the time the J.D. is awarded. Thinking like a lawyer involves divesting yourself of your preconceptions about the rights and wrongs of a case, your instinctive sense of where justice lies, or how fair play is exercised, in order to learn to analyze human actions as they intersect with law. The hypothetical cases presented on law school exams are intentionally baroque, with a plethora of ornament and potentially misleading byways. The student learning to think like a lawyer must sort it all out according to identifiable pertinent law, precedent, and legal doctrine. How is it like and unlike *x* number of cases that fall into the same general category? How, indeed, do you know to what category this particular instance belongs? To the uninitiated, such issues are formidably difficult: the legal savvy just isn't there. The novice reader of such

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1. See RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988, rev. ed. 1998).

material may be led to reflect on how a long American tradition, before the coming of the law school, made learning the law a matter of hands-on apprenticeship to a practicing attorney. The law is perhaps above all a *praxis*, a way of doing things, a language of shared references and intentions, and an enterprise very much directed towards an outcome: some form of adjudication, with winners, losers, settlements, sentences.

So the lawyer in training must learn to read and argue within the constraints of the law and its traditions. There may be a downside to this, in the claim that legal culture stands apart from other social practices and cultural understandings. Law after all lies embedded in most, perhaps all, of our ways of living in an ordered society, and there might be something to gain by holding law more closely responsible to other social and cultural creations of meaning. It may be valuable to challenge the implicit claim that legal terms of art—for instance, the language of “intent” or of “the will”—are self-definitional and off-limits to non-legal questioners. Is the notion of human agency implicit in much legal language true to contemporary understandings of how people behave? Does it matter? Do legal opinions obscure something of importance in describing confessions under interrogation as the product of a “free and rational will”? Consider, as an extreme example of the law’s attempt to keep its language to itself, the now infamous “Torture Memo” of August 1, 2002, which has constant recourse to the dictionary—to various dictionaries, in fact—to produce definitions of “torture” so bizarre that even the Bush administration was eventually, reluctantly, forced to repudiate them.<sup>2</sup>

The memo expresses the interpretation of the Justice Department’s Office of Legal Counsel on “standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code.” It constitutes a remarkable example of legal textualism run wild. In one among many examples, the authors of the memo note that: “The key statutory phrase in the definition of torture is the statement that acts amount to torture if they cause ‘severe physical or mental pain or suffering.’” But because the statute doesn’t define “severe,” they go on, “we construe a statutory term in accordance with its ordinary or natural meaning.” To find that ordinary and natural meaning, the memo turns first to Webster’s New International Dictionary (in the 1935 edition, for some reason) and then to the American Heritage Dictionary (1992) and the Oxford English Dictionary (1978), to discover that “se-

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2. See Jay S. Bybee, “Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,” available at [news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf](http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf), and in KAREN J. GREENBERG AND JOSHUA L. DRATEL, *THE TORTURE PAPERS* 172 (Karen J. Greenberg & Joshua L. Dratel ed.s, 2005). See also Peter Brooks, “The Plain Meaning of Torture,” *Slate*, Feb. 9, 2005, available at <http://slate.msn.com/id/2113314>.

vere” “conveys that the pain or suffering must be of such a high level or intensity that the pain is difficult for the subject to endure.” But that definition, however ordinary and natural, doesn’t meet their purposes. So they search the U.S. Code and discover: “Significantly, the phrase ‘severe pain’ appears in statutes defining an emergency medical condition.”

We need to ask whether the use of “severe pain” in the medical context (for insurance purposes, e.g.) is in fact more “significant” than any other uses of “severe,” whether in statutes or in ordinary usage. But it serves the purpose: the slide into medical usage allows the authors to assert that the pain which defines torture must involve damage that rises “to the level of death, organ failure, or the permanent impairment of a significant body function.” We’re now well into the emergency room.

Next comes the definition of “severe mental pain or suffering” in the torture statute, which includes inflicting “prolonged mental harm” intentionally. To “prolong,” Webster’s (1988 edition this time) tells our authors, is to “lengthen in time.” “Put another way, the acts giving rise to the harm must cause some lasting, but not necessarily permanent damage.” This transition suggests to them that “prolonged mental harm” (words not used elsewhere in the U.S. Code) might resemble the post-traumatic stress disorder, lasting months or even years, noticed in torture victims. This is thoroughly circular. It leads, over the next three paragraphs, to a claim that for torture to be torture requires a specific intent to cause prolonged mental harm by one of the predicate acts listed in the statute, and a defendant’s good-faith belief that the acts he or she committed would not amount to the acts forbidden by the statute would constitute a “complete defense to such a charge” of torture.<sup>3</sup> We may uneasily sense that we are witnessing a kind free play of the signifier of the sort that literary critics and philosophers are sometimes accused of sponsoring.

The truly “deconstructive” cast of Bybee’s interpretation of 18 U.S.C. § 2340 comes in the next section, which takes up “Harm caused by or resulting from predicate acts.” These acts include, *inter alia*, “the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality.” Since these “substances” are not further defined, Bybee sets out to make some distinctions. Here a longer quotation is necessary:

This subparagraph, however, does not preclude any and all use of drugs. Instead, it prohibits the use of drugs that “disrupt profoundly the senses or the personality.” To be sure, one could argue that this phrase applies only to “other procedures,” not the application of mind-altering substances. We reject this interpretation because the

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3. Bybee, *supra* note 2, at 8.

terms of Section 2340 (2) expressly indicate that the qualifying phrase applies to both “other procedures” and the “application of mind-altering substances.”

The word “other” modifies “procedures calculated to disrupt profoundly the senses.” As an adjective, “other” indicates that the term or phrase it modifies is the remainder of several things. See Webster’s Third New International Dictionary 1598 (1986) (defining “other” as “the one that remains of two or more”); Webster’s Ninth New Collegiate Dictionary 835 (1985) (defining “other” as “being the one (as of two or more) remaining or not included”). Or put another way, “other” signals that the words to which it attaches are of the same kind, type, or class as the more specific item previously listed. Moreover, where statutes couple words or phrases together, it “denotes an intention that they should be understood in the same general sense.” Norman Singer, 2A Sutherland on Statutory Construction § 47:16 (6th ed. 2000); see also *Beecham v. United States*, 511 U.S. 368, 371 (1994) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well.”) Thus, the pairing of mind-altering substances with procedures calculated to disrupt profoundly the senses or personality and the use of “other” to modify “procedures” shows that the use of such substances must also cause profound disruption of the senses or personality.<sup>4</sup>

To use the “or” of “or other procedures”—which are of course supposed to be of the same sort—to argue that “disrupt profoundly” somehow controls and limits the meaning of “mind-altering” seems to me far from commonsensical, a parsing of vocabulary and syntax that appears arbitrary and even a bit demonic. Whether or not this meaning was intended by Congress, the way the authors of the memo claim to find the meaning derives from an ungoverned and unscrupulous reading that uses—very selectively—dictionary definitions to produce arcane and obfuscating interpretations. I will refrain from citing the next paragraph, which takes us into the meaning of “disrupt” as “to break asunder; to part forcibly; to rend”—here we are back with the 1935 *Webster’s*, and a definition my 1975 *American Heritage* finds “obsolete”: what about a more usual definition, such as “to upset the order of”? But the authors of the memo need to come out, at the end of his paragraph, with: “Those acts must penetrate to the core of an individual’s ability to perceive the world around

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4. *Id.* at 10.

him, substantially interfering with his cognitive abilities, or fundamentally alter his personality.”<sup>5</sup>

The long-delayed report of the Office of Professional Responsibility of the Department of Justice arrived at the conclusion that John Yoo and Jay Bybee, authors of the memo, were indeed guilty of unethical practice—but this conclusion was annulled by David Margolis, senior career lawyer at DOJ, who found them guilty only of poor judgment. My main point is that the memorandum constitutes a remarkable example of legal textualism run wild. The common reader has a right to say—indeed a duty to say—no, this cannot be right, not even in the law. Legal interpretation must be held to some realist ethical standards. If the legal profession fails in this task, it may be time to bring in readers from outside law.

As I suggested earlier, it is arguable that law was from early in history closely allied to rhetorical practice—rhetoric in ancient Athens was mainly about helping you make your case in courts of law or other public assemblies. And in the early history of the United States, the practice of law seems to have been closely tied to a rhetorical tradition embodied in public oratory, very much taught in American high schools and fostered through public debate and oratorical contest. But the law eventually suppressed its rhetorical origins in favor of a claim to professional autonomy and a professionally hermetic language. Perhaps the process of disciplinary professionalization—represented in this case by the rise of the law school and its increasing autonomy within the university—always entails a repression of rhetorical origins, which come to seem scarcely avowable as a foundation. While legal studies, like courts of law, sometimes need to listen to testimony from fields outside, law nonetheless constantly asks: is this relevant to the law? On what terms can the law use it? The law assigns its actors various gate-keeping functions in order to preserve its autonomy and distinct nature.

Hidden within all our disciplinary formations may lie some residue of what was repressed over the course of their history. This residue might have a half-life that could let it still make a difference. What if legal studies were to rediscover the role of rhetoric and narrative in legal decisionmaking, for instance? What if learning to think like a lawyer were thought to require more questioning of what that really means? If legal knowledge necessarily relates to a pragmatic horizon—of what the knowledge is needed for—it might nonetheless ask if that horizon is too narrowly drawn. At the limit, legal studies might pay more attention to those critics—reaching back at least to Jean-Jacques Rousseau—who have claimed that law is founded on an act of violent usurpation and deceit. A similar claim was urged by Robert Cover in his well-known essay, *Violence and the Word*, and in his wake some others have noted with him

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5. *Id.* at 11.



that legal interpretation is exercised in a field of violence, suffering, dispossession, and even death.<sup>6</sup> Is the awareness of such a claim, even if it can never be an awareness except under erasure, totally useless for the student or even the practitioner of law?

Maybe we could state what is at stake in the encounter of law and literature in this manner: what if law and literature were not so much separate entities, but rather twins separated at birth and seeking (with something of the melodrama such searches involve) to reunite? That is, what if literature and its study (and the interpretive humanities in general) harbored a kind of *impensé* of the law that had been suppressed, or repressed, in the course of its evolution? In educational and institutional terms, this thesis would argue for a more active dialogue between legal and humanistic interpretive communities. The law and literature movement has arisen in large part from those who believe that law needs to be accountable to more than itself, to more than the legal institution, its languages and rituals. It needs to be tested against the realm of human value to which literature speaks—not in any simple sense of moral uplift but in its address to the human condition. This is what I mean by literature as law's other.

### 3. *Some Teaching Examples*

I want to pursue these large and slippery questions by way of pedagogy, in some examples of encounters of legal and literary textuality that I have made use of in teaching. I recently assigned a seminar of law students two texts to read together. One was Justice Antonin Scalia's *A Matter of Interpretation*, his Princeton Tanner Lectures of some years back, where he lays out his theory of constitutional interpretation.<sup>7</sup> When practicing statutory interpretation, Scalia wants to rule out any consideration of legislative history, the crutch usually relied on by courts when the "plain meaning" of a statute is not plain. Legislative committee reports, floor debates, and statements of intent by drafters and amenders, are really irrelevant, says Scalia, since they are not part of the text itself that was passed by Congress and signed into law by the President. The interpreter should restrict his or her attention to "the intent that a reasonable person would gather from the text of the law."<sup>8</sup> Yet when it comes to constitutional interpretation, he argues that, while one should not search for the intent of the Framers, one should seek out the "original understanding" of the text, how it was originally interpreted, consulting *The Federalist*, for instance, and views of delegates to the Constitutional

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6. See Robert Cover, *Violence and the Law*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 203 (Martha Minow, Michael Ryan & Austin Sarat eds., 1993).

7. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

8. *Id.* at 17.

Convention. That “reasonable person” who reads the text of a modern statute is here eclipsed by an original 1787er: Scalia explicitly rejects the notion that the “*current meaning*” of the text has any relevance. He contends that constitutions are designed precisely to *prevent* change. Scalia believes that we need to get rid of layers of constitutional interpretation that have accreted over the ages and back to what the text first meant. He concludes that in constitutional interpretation, the “originalist at least knows what he is looking for: the original meaning of the text.”<sup>9</sup> Textualism becomes originalism with a vengeance. I think that the “what” of “what he is looking for” is far more problematic than Scalia realizes. As literary critics understand, any recourse to how a document was understood in historical time at once opens up the prospect of a changing, evolving horizon of meaning. We know the Constitution as part of an interpretive history. Its “original understanding” is no more recoverable than the original intentions of the Founders.

Against Scalia I placed a short (and accessible) essay by Paul de Man, “The Return to Philology,” originally written for the *Times Literary Supplement*.<sup>10</sup> It’s an apologia for (very) close reading that argues that literature should be taught “as a rhetoric and a poetics prior to being taught as a hermeneutics and a history.”<sup>11</sup> The lesson de Man draws from the radical literalism of close reading, one that uses only what is derivable from the text—and demonstrable in the text—is that textual study should begin at the beginning, with the way texts *work*, the conditions and procedures by which they make meaning, rather than with an attempt to restate those meanings and their unfolding. The “return to philology” means “an examination of the structure of language prior to the meaning it produces.”<sup>12</sup>

This is a lesson that could be and probably should be taught in law schools. Why it is not may be suggested earlier in de Man’s essay, when he notes that the focus of most literary criticism on interpretation, rather than on rhetoric and poetics, makes the study of literature comparable to the study of “theology.”<sup>13</sup> Legal interpretation, including much legal scholarship, shares this kinship with theology. The law is indeed the closest thing to the sacred in societies that are tentatively, hesitantly secularized, with all sorts of nostalgia for Law with a capital L. Supreme Court justices are like medieval scholiasts or Talmudists, scribbling in the margins of holy writ. What if one were to apply such a program of reading to the law, setting aside the usual (quasi-theological) presumptions about what a given legal text *should* mean? What if the first year of law

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9. *Id.* at 45.

10. Paul de Man, *The Return to Philology*, reprinted in *THE RESISTANCE TO THEORY* (1986).

11. *Id.* at 25-26.

12. *Id.* at 24.

13. *Id.* at 22.

school required study of rhetoric and poetics, including linguistics and narratology, as well as the kind of midrash it now relies on?

One can move on from this confrontation to instances of the law attempting to interpret, indeed simply to read, in difficult circumstances: for instance, as to whether the display of a Christmas-time crèche on public property in Pawtucket, Rhode Island, violates the doctrine of separation of church and state. The Supreme Court—in *Lynch v. Donnelly*, most notably in Justice Sandra Day O'Connor's concurring opinion—finds itself forced to offer a theory of how we interpret symbols.<sup>14</sup> O'Connor briskly sets out to ascertain “both what Pawtucket intended to communicate in displaying the crèche and what message the city’s display actually conveyed.”<sup>15</sup> She explains: “The meaning of a statement to its audience depends both on the intention of the speaker and on the “objective” meaning of the statement in the community.”

One senses that something on the order of a semantic theory lies behind these words, but there is no footnote given, no reference to its possible sources.<sup>16</sup> I’m not sure why the meaning of a statement to an audience should depend both on the speaker’s intention and on the “objective” meaning—whatever that means—to the community. I would have thought that the community, the listeners to or spectators of the message, would themselves impute intention to the speaker. She concedes that some listeners will not have or will not seek evidence of intent; “for them the message actually conveyed may be something not actually intended.”

You might think that would be dispositive. But she argues rather that “examination of both the subjective and the objective components of the message communicated by a government action is . . . necessary to determine whether the action carries a forbidden meaning.”<sup>17</sup> She goes on to declare that “the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion.”<sup>18</sup> And a bit later: “The display of the crèche likewise serves a secular purpose—celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion.”<sup>19</sup>

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14. See *Lynch v. Donnelly*, 465 U.S. 668 (1984).

15. *Id.* at 690.

16. O'Connor is of course referring to different “prongs” of the “*Lemon* test,” derived from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), but it is not clear that the test helps in the explication of symbolic messages.

17. *Id.*

18. *Id.* at 692.

19. *Id.* at 693.

You may have some doubt about the government's intentions when you learn from Justice William Brennan's dissent that Pawtucket Mayor Lynch wanted the crèche as part of an effort to "keep Christ in Christmas."<sup>20</sup> What O'Connor claims must "fairly" be understood as the meaning of the message simply shows that "fairly" to send an unwitting message of its own, revealing a lack of awareness of how symbolic speech is given meaning by its listeners or viewers from the context of their own interpretive community. But it is not the specific question of the crèche in Pawtucket that interests me so much as the evident lack of a theory of meaning or communication on the part of a Supreme Court that pronounces on such questions as if it knew what meaning is and how it is formed. Any lawyer or law professor will at this point say to me: of course. The law settles matters by way of a kind of rough-and-ready, pragmatic, common-sense understanding of language—just as it interprets statutes according to the "plain meaning rule." Except that it does neither. The appeal to common sense and practical reason ought to induce suspicion—as literary critics should know at least since the work of Roland Barthes: common sense can itself be an ideological blinder that assumes "plain meanings" on the basis of one's limited perspective.<sup>21</sup> (O'Connor's "what viewers may fairly understand" is an example.) And when faced with a difficult case, such as a potent symbol, legal actors reach for theories of interpretation—and find them I'm not sure where.

This case—like others involving cross-burnings, displays of the Ten Commandments, and other symbolic speech or action<sup>22</sup>—shows up the evident lack of a theory of meaning or communication on the part of many Justices who pronounce on such questions as if they knew what "meaning" is and how it is formed. Any lawyer or law professor will at this point say to me: of course. The law settles matters by way of a kind of rough-and-ready, pragmatic, common-sense understanding of language—just as it interprets statutes according to the "plain meaning rule." Except that it does neither. The appeal to common sense and practical reason ought to induce suspicion—as we literary critics have known at least since the work of Roland Barthes: common sense can itself be an ideological blinder that assumes "plain meanings" on the basis of one's limited perspective (O'Connor's use of the phrase "what viewers may fairly understand" is an example). And when faced with a difficult case, such as a potent symbol, legal actors reach for theories of interpretation—and find them I'm not sure where.

The idea here is not to score points on those who are required to adjudicate difficult social issues involving communication but rather to

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20. *Id.* at 701.

21. See ROLAND BARTHES, MYTHOLOGIES, trans. Annette Lavers, 1972.

22. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Virginia v. Black*, 528 U.S. 343 (2003); *Van Orden v. Perry*, 545 U.S. 677 (2005).

show that there are other disciplines and interpretive cultures that have developed some expertise that might be relevant to the adjudication. The law is a decisionmaking process—the “common law” is in fact the sum of the decisions made in the past, which need to be read and interpreted in order to know how the present case resembles and differs from the tradition in which it stands. The law—whether common law, or statutory or constitutional interpretation—is inherently intertextual, and the ways in which it reads precursor texts in order to arrive at the creation of a new text—a new legal opinion—has close analogues in literary history. So it is that a number of classic texts on how to read literature may prove helpful in thinking about problems of legal interpretation in ways that judges rarely articulate.

In my own teaching of law and literature—inevitably, given my scholarly concerns over the years—questions of narrative tend to assume a large place. A riveting public trial—O.J. Simpson, the Rodney King case—often serves to remind us how much the law is compounded of narrative. It is all about competing stories, from those presented at the trial court—elicited from witnesses, rewoven into different plausibilities by prosecution and defense, submitted to the critical judgment of the jury—to their retelling at the appellate level—which must pay particular attention to the rules of storytelling, the conformity of narratives to norms of telling and listening—on up to the Supreme Court, which must tress together the story of the particular case at hand and the history of constitutional interpretation, according to the conventions of *stare decisis* and the rules of precedent, though often—since dissents are allowed—presenting different tellings of the story, with different outcomes.<sup>23</sup>

Trial lawyers know that they need to tell stories—that the evidence they present in court must be bound together and unfolded in narrative form—and law school clinics in courtroom advocacy pay attention to storytelling skills as part of the art of persuasion. Yet the law rarely speaks in a doctrinal or analytic way about its narrative dimension. On the contrary, it seems to want to deny the importance of story, to tame it by legal rule, to interrupt it by cross-questioning, to suppress it through the equation of story with the emotional, the irrational, the dangerous wild card in a discourse committed to reason and syllogism. The analytic tools of narratology, including questions of point of view, voice, implied audience, and the fundamental distinction between story and narrative discourse (*fabula* and *shuzhet*, in the fundamental Russian Formalist distinction), are almost never found in the law, even in those cases that seem urgently to call for such attention.

I have worked with students on a well-known rape case from Maryland,

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23. For a more detailed discussion of these points, see Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1 (2006).

*Rusk v. State/State v. Rusk*.<sup>24</sup> Rusk was convicted at trial; the conviction was reversed in the first appellate court, then reinstated in the highest state court. In the decisions on each level, there was a majority and a minority opinion starkly opposed to one another. Thus we have four different retellings of what we know is the "same" story—the story of what happened between a man and a woman one night in Baltimore, the story then constructed at trial—with dramatically different results, results that send Rusk to prison for seven years or else release him. How can these four stories, based on the same "facts"—and none of the principal events of what happened that night was in dispute—have different outcomes? The answer, I think, is that the narrative "glue" is different: the way incidents and events are made to combine in a meaningful story, one that can be called "consensual sex" on the one hand or "rape" on the other.<sup>25</sup> The blanks of intention and meaning are filled in by the judges' differing narrative discourses and presuppositions. Often, one detects, what is at issue is a judge's sense of how a woman is supposed to behave in certain circumstances, a set of unexamined cultural *doxa* (as Roland Barthes would have said) that work toward our everyday construal of narratives. The differing outcomes in the retellings of the *Rusk* cases offer a dramatic instance of how narratives take on design, intention, and meaning. Narratives do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results.

Anthony Amsterdam and Jerome Bruner (lawyer and psychologist respectively) argue that the traditional notion that adjudication proceeded by "examining free-standing factual data selected on grounds of their logical pertinency" must give way to the realization that "increasingly we are coming to recognize that both the questions and the answers in such matters of 'fact' depend largely upon one's choice (considered or unconsidered) of some overall narrative as best describing *what happened* or *how the world works*."<sup>26</sup> These assertions seem unimpeachable to literary narratologists, who have long argued that narrative is one of the large categories in which we order and construct reality. But I think that they remain heretical within the world of the law, which does not overtly recognize "narrative" as a category in the process of legal adjudication. A dialogue that brings such narratologists as Boris Tomachevsky, Tzvetan Todorov, Roland Barthes, Gérard Genette, Shlomith Rimmon-Kenan (for example) to bear on the shape and intent of literary narratives can be useful in showing how narratives work on their listeners and readers, how their formal designs make designs on their audience. Narrative is never

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24. *Rusk v. State*, 406 A.2d 624 (Md. Ct. Spec. App. 1979); *State v. Rusk*, 424 A.2d 720 (Md. 1981).

25. See Brooks, *Narrative Transactions*, *supra* note 23, at 10-14.

26. ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 111 (2000).

innocent; it always intends. And in the law, the way that intention is decoded—the kind of conviction produced by a given narrative—has much to do with whether or not the outcome is conviction in the penal sense.

So I tend to teach my courses with a focus on narrative and rhetorical transactions: the ways in which stories and arguments at the law are made effective, made operative—and the need for an analytical, even a suspicious attention toward the ways in which narrative and rhetoric work on us. "A syllogism is not a story," writes Justice David Souter in *Old Chief v. United States*, the only Supreme Court opinion I know of that actually discusses the possible import of narrative in the law.<sup>27</sup> Syllogisms may mask stories, however; and stories may imply syllogisms. The literary critic's sense of genre and how it works seems a useful part of the legal actor's and the legal analyst's toolkit. It can, for instance, provide insight into evidentiary stories—narratives of search and seizure and the possible legality of what they uncover—and the confessional stories on which so many convictions depend. "Beyond a reasonable doubt?" That is the persuasive outcome of a number of narrative logics.

#### 4. Interpretation Unbound

To read is to interpret, whether it be a question of narrative or the meaning of symbols, or grammatical clauses. Messages have senders and receivers, codes and contexts and channels of communication—an ensemble rarely activated in wholly unproblematic ways. An interpreter is etymologically—and still today—a go-between, an ambassador of meanings, someone who carries understandings from one camp to the other, and who stands between a text and what it is held to mean. That there is a need to interpret—that meanings don't simply announce themselves—implies that there is a certain opacity in the communicative situation.

Let me in conclusion discuss one further case: *District of Columbia v. Heller*,<sup>28</sup> where Justice Scalia's confidence in his interpretive powers enables him to overturn the gun control laws of the District of Columbia, which has one of the highest firearm homicide rates in the world. Justice Scalia recognizes the inevitability of interpretation in appellate decisionmaking in *A Matter of Interpretation*.<sup>29</sup> In the case at hand, he interprets the famously vexing language of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>30</sup> The

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27. 519 U.S. 172, 189 (1997).

28. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2788 (2008).

29. SCALIA, *supra* note 7, at 10, 13-14.

30. U.S. CONST. amend. II.

long-standing debate here concerns the linkage of the different propositions in this sentence. After a brief recitation of the facts of the case, Scalia begins his opinion: "We turn first to the meaning of the Second Amendment."<sup>31</sup> Note that he does not speak of the "interpretation" of the Amendment, or of its "possible meanings," or of the reconstruction of the context of its reading and understanding, or anything of the sort that would require him to acknowledge that he is embarked on an interpretive enterprise here. Rather, he offers us "the meaning" of the Amendment, which turns out to be an individual right to keep and bear arms for self-defense—a right that seems to fit better into twenty-first than eighteenth century controversies.<sup>32</sup> This meaning of the Amendment is made patent, he tells by page 19 of the opinion, by "[p]utting all these textual elements together."<sup>33</sup> Some assembly required, then, but apparently no tools needed.

The most enigmatic of "textual elements" in the Amendment has always been the relation of the first phrase, on the well-regulated militia, being necessary to the Security of a free State, to the right to bear arms—an enigma enhanced by the strange eighteenth century punctuation of the sentence. Scalia briskly solves the problem by calling the first phrase a "prefatory clause" (it is not in fact grammatically a clause), whereby the rest of the sentence becomes "the operative clause"—which essentially allows him to discount any limiting effect of part one on part two. Later, he will recharacterize part one as a "prologue," trivializing it still further.<sup>34</sup>

Now, Scalia is clearly aware of an amicus brief in this case—he cites it, but then ignores its argument, though one senses a covert polemic with it in his opinion—that was filed on behalf of a group of "Professors of Linguistics and English," in "an effort to assist the Court in understanding eighteenth century grammar and the historical meaning of the language used in the Second Amendment."<sup>35</sup> That sounds exactly like something an "original understanding" jurist should welcome. The brief is in fact of the greatest interest to anyone concerned with reconstructing past contexts for interpretation. The professors argue that "under longstanding linguistic principles that were well understood and recognized at the time the Second Amendment was adopted," the "well regulated militia" phrase

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31. 128 S.Ct. at 2788.

32. This point has been made by Reva Siegel, among others, who shows that the controversies that the context of Scalia's "originalist" reading of the Second Amendment in fact derives from twenty-first century political controversies over gun use/gun control. See Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

33. 128 S.Ct. at 2797.

34. 128 S.Ct. at 2790, n.4.

35. Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in support of Petitioners. 128 S.Ct. 2783 (No. 07-290.), at 2. The professors note in passing that we should not worry about the punctuation of the Amendment, since eighteenth century usage regarded commas more as breathing marks than logical breaks. *Id.* at 5, n. 2.



provides the reason for the “keep and bear arms” clause.<sup>36</sup> The first part of the Amendment, “A well regulated militia, being necessary to the security of a free state,” is a Latinate construction, an English version of what in Latin is called an “ablative absolute.”<sup>37</sup> If you studied Latin, you will recall that this construction in the ablative case does not agree grammatically with any noun in the main part of the sentence but rather modifies it all, representing a condition of cause, or manner, or temporal context. We don’t on the whole use absolute constructions today, except in stock phrases such as “that being the case” and “all things being equal” and “weather permitting”—they smack too much of the dangling modifier. We would today find such a construction grammatically faulty, but it was utterly commonplace in eighteenth century English, at a time when most literate people were trained in Latin translation and composition, and indeed derived their stylistic models from Latin. Reading and writing for those who were in a position to postulate the “original understanding” of the Constitution was essentially a matter of mastering Latin grammar and rhetoric. The professors cite a number of ablative absolutes from James Madison’s pen, for instance, including his first draft of the Second Amendment, which inserts the absolute phrase on the militia in the middle of the sentence.

A standard textbook, *Essentials of Latin*, tells us: “In translating an ablative absolute, one must use judgment in selecting a translation that is consistent with the meaning of the main verb.”<sup>38</sup> The Amendment should be construed to mean: “*Because* a well-regulated militia is necessary to the security of a free state . . .” If that is the case, the right to bear arms is clearly tied to service in a militia, as a logical entailment—as Justice Stevens will argue in his dissent (though he doesn’t take what is in my view the logical next step, which is to decide that with the demise of state and local militias, the Second Amendment simply has no application today). Scalia doesn’t dispute the “Because” translation—but he does not then truly seek consistency between the “prefatory clause” and the main verb. Instead, he drives a deeper wedge between the two principal parts of the sentence, then patches them together with connectives of his own making. He derives from the Amendment a “right of the people” to self-defense that denies any force to the militias clause. While dismissing Justice Stevens’s interpretations as “grotesque” and “worthy of the mad hatter,” he arrives, after a number of twists and spins, at this rhetorical dodge: “The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly

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36. *Id.* at 2-3.

37. *Id.* at 3, 7-8.

38. HENRY CARR PEARSON, *ESSENTIALS OF LATIN* 152 (New York: American Book Company, 1912).

thought it even more important for self-defense and hunting.”<sup>39</sup> Watch out for “undoubtedly”s—along with the reiteration of “unambiguously refer” and the like, which return insistently in the opinion.

Scalia sweeps the argument of the amicus brief aside with the claim: “Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”<sup>40</sup> It is hard to credit his good faith here. His declaration sounds democratic, even populist, but he must know that “ordinary citizens” in the founding generation who could read and write would not have found Latinate constructions “secret or technical,” but on the contrary the stuff of everyday public oratory and writing. Scalia's opinion in fact unfolds as what you might call a series of philological coups d'état—he pulls out of other Constitutional clauses the inference that the right involved in Second Amendment is “unambiguously” individual, not collective—a few pages later, it becomes “the individual right to possess and carry weapons in case of confrontation.”<sup>41</sup> (Wherever did the notion of “confrontation” come from?) Then a few pages after that, “individual self-defense” has become, in italics, “the *central component* of the right itself.”<sup>42</sup> This is really a personal delirium posing as a necessary reading. At the last, to Scalia the right guaranteed by the Second Amendment comes to be about “the inherent right to self-defense”<sup>43</sup> and the Constitutional bar to prohibiting “handguns held and used for self-defense in the home.”<sup>44</sup> It appears that the interpretation of constitutional language has been usurped by some appeal to natural law or perhaps sociobiology.

Scalia's interpretive reasoning in *Heller* has not gone uncriticized, especially by former allies in the conservative camp. J. Harvie Wilkinson asserts that the Constitution says no more about rules for handgun ownership than it does about trimesters of pregnancy—conflating *Heller* with *Roe*, in the ultimate conservative gesture of rejection. Richard Posner refers to Scalia's opinion as “faux originalism.”<sup>45</sup> A year after *Heller*, Judge Frank Easterbrook, in turning back the NRA's challenge to Chicago gun control laws, asserted that: “The way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the

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39. 128 S.Ct. at 2801.

40. *Id.* at 2788.

41. 128 S.Ct. at 2797.

42. 128 S.Ct. at 2801.

43. *Id.* at 2817.

44. *Id.* at 2822.

45. J. Harvie Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, THE NEW REPUBLIC, Aug. 27, 2008.

contemporary debate.”<sup>46</sup> That is, I think, a good sentence to set against Scalia’s “We turn first to the meaning of the Second Amendment.”

The point I wish to stress is this: if you are going to base a major decision (overturning the acts of legislatures) on acts of linguistic interpretation, you need to know what you are doing. You live and die by your interpretive mastery. You need to have principles and methods of interpretation, and when you are dealing with texts from over two centuries ago, you need to have philological understanding as well. The Professors of Linguistics at least have principles for their interpretation, and at least they understand that they are engaged in an *act* of interpretation, of construal—that the meaning of the sentence needs to be constructed, not simply read off. Scalia’s act of reading finally appears to be not so much authoritative as authoritarian—like Humpty Dumpty’s claim to Alice, in *Through the Looking Glass*, that words mean what he commands them to mean:

“There’s glory for you!”

“I don’t know what you mean by ‘glory,’” Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant ‘there’s a nice knock-down argument for you!’”

“But ‘glory’ doesn’t mean a ‘nice knock-down argument,’” Alice objected.

“When *I* use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”<sup>47</sup>

When legal interpretation issues in the mere assertion of mastery, perhaps it is time to bring in the professors of literature. They at least understand that the act of interpretation is an act of translation, of mediation. The act of historical interpretation always has an archaeological dimension: the reconstruction of context from remains that may be fragmentary. Reconstruction always involves the hypothetical construction of the missing portion. History never simply gives us the answer: it must itself be used in an interpretive act—as *Heller* surely demonstrates.

Here, I would recall de Man, who contends that literature should be taught “as a rhetoric and a poetics prior to being taught as a hermeneutics

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46. *National Rifle Ass’n v. City of Chicago*, 567 F.3d 856, 860 (7th Cir. Ill. 2009).

47. LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 186 (New York: NAL/Signet, 1960).

and a history.”<sup>48</sup> That is, the study of texts should begin with the way they work, not with what they mean: begin with a description of the linguistic construct and the conditions for its production of meaning. (A lesson taught as well, in a non-theoretical way, in the New Critic William Wimsatt’s essay, “What to Say About a Poem.”<sup>49</sup>) De Man’s “return to philology,” means “an examination of the structure of language prior to the meaning it produces.”<sup>50</sup> Is this a lesson that is applicable to legal training? Would it lead to a productive self-consciousness about the moment when one moves from the description of messages and their signifying systems to the attempt to state their meaning? Would it provide a useful antidote to the teaching of law as “theology”? Could one bring the law to *reading*, in the radical sense urged by de Man?

I’m not sure that the legal profession can make room for reading of this sort: it is too demanding and impractical. Nonetheless, legal education might consider that teaching the grounds for the production and interpretation of legal meanings might eventually influence the profession toward more nuanced and theory-responsible interpretation. I offer this thought experiment to urge that “law and literature” can matter. Professors of literature may be friends of the court when they contend that interpretation is an enterprise of mediation that never is unproblematic, and that it depends in the first instance on an accurate description of the text to be interpreted, which includes grammar and syntax and rhetoric—subjects that after all have millennial histories, ignored at one’s peril—or at least at the District of Columbia’s peril.

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48. De Man, *supra* note 10, at 26.

49. See William Wimsatt, *What to Say About a Poem*, in *HATEFUL CONTRARIES* 215 (1965).

50. De Man, *supra* note 10, at 24.

